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No. 04-1140

In the Supreme Court of the United States

GERALD T. MARTIN AND JUANA M. MARTIN,
PETITIONERS

v.

FRANKLIN CAPITAL CORPORATION, ET AL.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING RESPONDENTS

PAUL D. CLEMENT
Solicitor General
Counsel of Record
PETER D. KEISLER
Assistant Attorney General
THOMAS G. HUNGAR
Deputy Solicitor General
JAMES A. FELDMAN
Assistant to the Solicitor General
MICHAEL JAY SINGER
MICHAEL E. ROBINSON
Attorneys
Department of Justice
Washington, D.C. 20530-0001
(202) 514-2217

QUESTION PRESENTED

Whether a district court abuses its discretion to award costs and fees in issuing a remand order under 28 U.S.C. 1447(c) by denying such an award where the removing party had objectively reasonable legal grounds for removal.

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INTEREST OF THE UNITED STATES

The United States frequently seeks to remove cases from state to federal court. Actions in state court against the United States or its officers and agencies may be removed pursuant to 28 U.S.C. 1442, and suits against or prosecutions of members of the armed forces may be removed under 28 U.S.C. 1442a. Additionally, 28 U.S.C. 2679 provides for the removal of state-court suits against federal employees whose conduct is certified as within the scope of their employment. Those statutes reflect a strong legislative policy in favor of adjudicating matters of federal concern in a federal forum. As a result, the United States has a substantial interest in ensuring that, to the extent that the United States and

its employees are subject to fee awards under Section 1447(c), good-faith and objectively reasonable pursuit of this policy will not expose the government and its employees to subsequent claims for attorney's fees under 28 U.S.C. 1447(c).[1]

Even when it is neither a party nor representing a party, the United States may nonetheless have a substantial interest in the removal to federal court of cases involving issues of importance to the federal government, including those raising unsettled jurisdictional questions. *E.g.*, *Grable & Sons Metal Prods., Inc.* v. *Darue Eng'g & Mfg.*, 125 S. Ct. 2363 (2005). The construction of Section 1447(c) could in practice affect the incentives for—and, consequently, the willingness of—private parties to undertake such removals. The United States therefore has an interest in clarifying the circumstances under which a district court may award fees under Section 1447(c).

STATEMENT

1. Petitioners, residents of New Mexico, filed a class action lawsuit against respondents in state court in New

[1] When the United States removes a case from state court and the case is later remanded, an award of attorney's fees would appear to be inappropriate in any event, because Section 1447(c) does not contain a waiver of sovereign immunity. That issue (including the relevance, if any, of the waiver contained in 28 U.S.C. 2412(b)), has not been resolved by the lower courts. Even if fee awards were available against the United States for unreasonably removed cases, moreover, the United States has a unique interest in litigating in federal court, which would have to be taken into account by a court considering a Section 1447(c) fee award. And some federal removals, such as those under 28 U.S.C. 2679, are not subject to the general removal statutes, including Section 1447(c). See *Haddon* v. *United States*, 68 F.3d 1420, 1426 (D.C. Cir. 1995); *Nasuti* v. *Scannell*, 906 F.2d 802, 809 (1st Cir. 1990); but see *Allstate Ins. Co.* v. *Quick*, 254 F. Supp. 2d 706, 725-727 (S.D. Ohio 2002).

Mexico in 1996. They contended that respondents had violated state unfair practice statutes and breached contractual and fiduciary duties in connection with their automobile financing and insurance contracts. J.A. 9-33. Respondents removed the case to the United States District Court for the District of New Mexico on the basis of diversity of citizenship. J.A. 34. Petitioners did not object to removal at that time. Pet. App. 2a.

Although the amount in controversy was unclear from the face of the complaint, see J.A. 9-33, respondents argued in their notice of removal that the case met the then-applicable $50,000 amount-in-controversy requirement on three grounds. First, petitioners sought treble damages on their statutory claims. Second, petitioners sought punitive damages for the entire class on their common-law claims, and respondents argued (relying on recent out-of-circuit precedent) that the total amount of the punitive damages sought for the class was attributable to the named plaintiffs for jurisdictional purposes. J.A. 35-36. Third, petitioners sought attorney's fees for the entire class on all of their claims, and respondents argued (again, relying on recent out-of-circuit precedent) that the total amount of fees sought was attributable in the aggregate to the named plaintiffs for jurisdictional purposes. J.A. 35.

In late 1997, after more than a year of federal litigation, petitioners filed a motion to remand the case to state court, asserting that their claims did not meet the amount-in-controversy requirement. Pet. App. 2a. The district court denied the motion, holding that the damages sought by petitioners, together with the aggregate amount of the requested attorney's fees, exceeded the $50,000 minimum. J.A. 42, 44, 49.

On appeal, the Tenth Circuit reversed. *Martin* v. *Franklin Capital Corp.*, 251 F.3d 1284 (2001) (*Martin I*); see J.A. 51. The court held that the claim for treble damages applied to only one state statute, under which the specific damages recoverable were uncertain. J.A. 60. With regard to the aggregation of punitive damages, the court of appeals, after noting that the issue was one of first impression within the circuit, J.A. 61, held that the aggregate amount of punitive damages sought by the class is an insufficient basis for jurisdiction. The court relied in part on *Leonhardt* v. *Western Sugar Co.*, 160 F.3d 631 (10th Cir. 1998), which was decided two years after the removal in this case and held that the claims of each class member must independently satisfy the amount-in-controversy requirement. J.A. 61. The court refused to attribute the aggregate attorney's fees for the class to the named plaintiff, for essentially the same reasons that it declined to aggregate punitive damages. J.A. 63. The court of appeals held that the case should be remanded to state court.[2]

2. Petitioners filed a motion in the district court for approximately $60,000 in attorney's fees and other costs and expenses under 28 U.S.C. 1447(c). Pet. App. 14a. They argued that Section 1447(c) presumptively entitles a party who obtains a remand to such fees. The district court denied the motion, holding that an award of fees under Section 1447(c) is discretionary. *Id.* at 16a. The court noted that the Tenth Circuit's ruling in *Martin I* had relied heavily on changes in the law that occurred

[2] The court's reliance on *Leonhardt* and its holding that each class member must independently satisfy the jurisdictional requirements, see J.A. 64-65, have been undermined by *Exxon Mobil Corp.* v. *Allapattah Servs., Inc.*, 125 S. Ct. 2611, 2615 (2005). See *id.* at 2616 (citing *Leonhardt* as agreeing with view that this Court rejected).

after the removal. *Id.* at 16a-20a. The district court concluded that it was therefore inappropriate to award fees. *Id.* at 20a.

3. The Tenth Circuit affirmed. Pet. App. 1a-13a. The court of appeals agreed that the district court had discretion in awarding costs and fees under Section 1447(c). *Id.* at 4a. The court noted the "broadly accepted position that if a defendant's removal could be fairly supported by the law at the time, even if later deemed incorrect, a district court's discretionary decision not to award fees is appropriate." *Id.* at 6a. The court held that the district court had properly denied fees, because it had determined that "[respondents'] removal position was objectively reasonable at the time they sought removal." *Id.* at 7a.

SUMMARY OF ARGUMENT

I. Section 1447(c) provides that a remand order "may" require payment of attorney's fees, without expressly mandating awards in particular circumstances. Accordingly, the statute grants discretion to district courts in making such awards, which precludes petitioners' proposed rule making such awards virtually automatic. That is not to say, however, that district courts have unconstrained discretion to grant or deny fee awards on remand. This Court's cases in analogous settings have made clear that some limiting principles are implicit in similar grants of discretion. In a single instance—that of prevailing civil rights plaintiffs—the Court has held that such fee-shifting provisions presumptively require the award of fees to prevailing plaintiffs because of the special justifications for fee awards in those circumstances. *Newman* v. *Piggie Park Enters., Inc.*, 390 U.S. 400, 402 (1968) (per curiam).

In other circumstances, however, the Court has made clear that the discretionary authority to award fees allows the award of fees against unsuccessful plaintiffs or intervenors only on a showing that the party's position was "frivolous, unreasonable, or without foundation." *Christiansburg Garment Co.* v. *EEOC*, 434 U.S. 412, 421 (1978); see *Independent Fed'n of Flight Attendants* v. *Zipes*, 491 U.S. 754 (1989).

The *Piggie Park* presumption is based on two rationales: (1) the prevailing civil rights plaintiff's status as a "private attorney general," and (2) the losing defendant's status as a violator of substantive federal proscriptions against discrimination. Neither of those rationales is applicable here. A party that obtains a remand remains a private litigant pursuing private goals, and the removing party, though unsuccessful in the procedural dispute over removal, has in no sense violated any substantive proscriptions of federal law.

Given the absence of any justification for resort to the *Piggie Park* presumption in the context of Section 1447(c), fee awards under that statute are most appropriately governed by the more general standard of *Christiansburg Garment*, which permits fee awards only if the unsuccessful party's position was "frivolous, unreasonable, or without foundation." An unsuccessful removing party, like an unsuccessful civil rights plaintiff, has invoked a federal right granted by Congress (here, the right to remove cases). In both the civil rights context and here, it should not be assumed that Congress intended to confer a federal right while, at the same time, discouraging its invocation in all but the most obvious cases by imposing fee awards in response to reasonable, but unsuccessful, assertions of the right.

This Court has applied the *Christiansburg Garment* standard in other contexts in which the special rationales that support the *Piggie Park* presumption are inapplicable. In *Zipes*, the Court held that the "frivolous, unreasonable, or without foundation" standard applied to the award of fees against an unsuccessful intervenor in a civil rights action, 491 U.S. at 758, and the Court has suggested that the lower courts may appropriately look to similar considerations under the Copyright Act. See *Fogerty* v. *Fantasy, Inc.*, 510 U.S. 517 (1994). The *Christiansburg* standard should be applied here as well.

II. The legislative history of Section 1447(c) confirms that result. The statutory reference to attorney's fees was added to Section 1447(c) in 1988 as part of an omnibus bill addressing a great many substantive and housekeeping matters concerning the federal judiciary. Nowhere in the history of that bill is there any express discussion of awards of attorney's fees. Under the deep-rooted American Rule, each party in litigation bears its own fees. If Congress had intended to reverse that rule and award fees as a matter of course to a party that successfully obtains a remand, "[s]uch a bold departure from traditional practice would have surely drawn more explicit statutory language and legislative comment." *Fogerty*, 510 U.S. at 534.

In amending Section 1447(c), Congress was most likely pursuing a much more modest goal. By 1988, there was a split in authority over whether the then-existing provision permitting an award of "costs" also permitted an award of attorney's fees in the absence of bad faith conduct, with the weight of authority holding that it did not. As a result, a number of courts had concluded that they could not award fees in response to

an unreasonable or frivolous removal, absent a showing of bad faith. It is reasonable to infer that the Judicial Conference proposed—and Congress enacted—the amendment in order to resolve that disagreement and permit fee awards when the removal was without reasonable legal foundation. Although Federal Rule of Civil Procedure 11 would now permit a similar result without the statutory amendment, the scope of Rule 11 was less clear before its 1993 amendment, which eliminated the last trace of a "good faith" defense.

III. Contrary to petitioners' arguments, the policies underlying the removal statutes suggest that fees should not be awarded in the absence of unreasonable or bad faith removals. Routinely awarding fees in remand orders would tend to discourage all but the most obviously permissible removals. There is no basis whatever for petitioners' contention that Congress adopted the 1988 amendments specifically or the removal statutes more generally in order to deter removals and, in particular, to disfavor removals that were based on reasonable, but unsettled, legal positions. To the contrary, the removal statutes themselves suggest that removal is an important aspect of a federal system of overlapping jurisdiction, not some disfavored procedural device. That view is consistent with this Court's recent affirmation that removal may serve a valuable function in permitting parties to obtain a federal forum for cases that sensibly belong in federal court. *Grable & Sons Metal Prods., Inc.* v. *Darue Eng'g & Mfg.*, 125 S. Ct. 2363, 2367-2368 (2005). As in *Grable*, removal based on a reasonable, though not yet established, legal foundation can clarify the law for present and future litigants. If fees are awarded only when the removal is without foundation or in bad faith,

unreasonable removals will be discouraged, but litigants will not shy away from seeking clarification of unresolved legal issues relating to removal jurisdiction, and meritorious removals will face no barrier. That approach is more in keeping with the policies underlying the removal statutes.

ARGUMENT

I. ABSENT EXCEPTIONAL CIRCUMSTANCES, COURTS SHOULD AWARD ATTORNEY'S FEES UNDER SECTION 1447(c) ONLY ON A FINDING OF BAD FAITH OR OBJECTIVELY UNREASONABLE CONDUCT

Section 1447(c) provides that a remand order "*may* require payment of just costs and any actual expenses" (emphasis added). In construing closely analogous language in *Fogerty* v. *Fantasy, Inc.*, 510 U.S. 517 (1994), this Court explained that "[t]he word 'may' clearly connotes discretion," and "[t]he automatic awarding of attorney's fees to the prevailing party would pretermit the exercise of that discretion." *Id.* at 533.[3] By the same token, petitioners' proposed standard, under which fees would automatically be awarded upon remand, is inconsistent with the discretion granted to district courts under Section 1447(c).

To be sure, "in a system of laws discretion is rarely without limits." *Independent Fed'n of Flight Attendants* v. *Zipes*, 491 U.S. 755, 758 (1989). In the context

[3] The statute at issue in *Fogerty* provides that:

> In any civil action under [Title 17], the court in its discretion may allow the recovery of full costs by or against any party other than the United States or any officer thereof. Except as otherwise provided by this title, the court *may also award a reasonable attorney's fee* to the prevailing party as part of the costs.

17 U.S.C. 505 (emphasis added).

of fee-shifting statutes in particular, this Court has repeatedly held that "the law * * * does not interpret a grant of discretion to eliminate *all* 'categorical rules.'" *Id.* at 760-761. But this Court's cases provide no warrant for petitioners' attempt to engraft a rule of automatic or presumptive fee awards onto Section 1447(c). Instead, fees should generally be awarded, as this court has concluded in a number of other contexts, only against a party that has acted without reasonable foundation or in bad faith. See *Christiansburg Garment Co.* v. *EEOC*, 434 U.S. 412, 421, 422 (1978).

A. There Is No Basis For Construing Section 1447(c) To Mandate Automatic Or Presumptive Fee Awards

Petitioner contends (*e.g.*, Pet. 7) that the rule authorizing a presumptive award of fees to prevailing civil rights plaintiffs also applies to parties that obtain a remand under Section 1447(c). This Court's precedents refute that contention.

1. In *Newman* v. *Piggie Park Enters., Inc.*, 390 U.S. 400, 402 (1968), this Court issued a short, per curiam opinion holding (in the context of a case under Title II of the Civil Rights Act of 1964) that a prevailing civil rights plaintiff who proves that the defendant has engaged in discrimination "should ordinarily recover an attorney's fee unless special circumstances would render such an award unjust." See *Albermarle Paper Co.* v. *Moody*, 422 U.S. 405, 415 (1975) (same for Title VII); *Hensley* v. *Eckerhart*, 461 U.S. 424, 429 (1983) (same for 42 U.S.C. 1988).

As this Court has repeatedly explained, that presumption in favor of fee awards to civil rights plaintiffs rests upon two critical factors. First, as *Piggie Park* itself emphasized, the plaintiff in a civil rights suit

obtains relief "not for himself alone but also as a 'private attorney general,' vindicating a policy that Congress considered of the highest priority." 390 U.S. at 402. An award of attorney's fees to a prevailing plaintiff under the civil rights laws thus serves to advance "the national policy against wrongful discrimination by encouraging victims to make the wrongdoers pay at law—assuring that the incentive to [bring] such suits will not be reduced by the prospect of attorney's fees that consume the recovery." *Zipes*, 491 U.S. at 761; *Albemarle Paper Co.*, 422 U.S. at 415 (same for Title VII). The civil rights plaintiff, whose suit is "private in form only," *Piggie Park*, 390 U.S. at 401, is the "chosen instrument" of Congress's policy, and awarding fees to a prevailing plaintiff directly furthers that policy. *Christiansburg Garment*, 434 U.S. at 418.

Second, the Court has "emphasized the crucial connection between liability for violation of federal law and liability for attorney's fees under federal fee-shifting statutes." *Zipes*, 491 U.S. at 762. Awarding fees to a prevailing plaintiff necessarily means awarding fees against "a violator of federal law." *Christiansburg Garment*, 434 U.S. at 418. See *Kentucky* v. *Graham*, 473 U.S. 159, 165 (1985) ("[L]iability on the merits and responsibility for fees go hand in hand."). By contrast, the Court has declined to permit an award of fees against a defendant who is immune from substantive liability, see *Supreme Court of Va.* v. *Consumers Union of the United States, Inc.*, 446 U.S. 719, 738 (1980), or an "innocent"—albeit unsuccessful—intervenor that has "not been found to have violated anyone's civil rights" in a Title VII suit, *Zipes*, 491 U.S. at 762, 763.

2. In *Christiansburg Garment*, the Court declined to apply the *Piggie Park* presumption to claims for

attorney's fees by prevailing *defendants*. The Court explained that the presumption was inapplicable because the "equitable considerations counseling an attorney's fee award to a prevailing Title VII plaintiff * * * are wholly absent in the case of a prevailing Title VII defendant." 434 U.S. at 418. In this case, as in *Christiansburg Garment*, neither of the rationales that justified a virtually automatic award of fees to a prevailing plaintiff in *Piggie Park* is present.

First, a party that obtains a remand of a suit to state court has in no sense acted as a "private attorney general" or otherwise "vindicat[ed] a policy that Congress considered of the highest priority." *Piggie Park*, 390 U.S. at 402. Although the party that obtains the remand has achieved some measure of procedural success, it has done so, as far as Section 1447(c) is concerned, in the course of a private suit in pursuit of its own private interests. In enacting civil rights legislation, Congress was vitally concerned with eliminating racial discrimination in public accommodations; a virtually automatic award of attorney's fees to a prevailing plaintiff helps accomplish that end. By contrast, there is no reason to believe that Congress in the removal statutes was trying to advance any particularly weighty public interest in discouraging the use of the federal courts by litigants. To the contrary, the removal statutes reflect Congress's judgment that removal is a healthy feature of a federal system of overlapping jurisdiction. Accordingly, the "private attorney general" rationale does not support petitioners' position that a district court should automatically or presumptively award fees to a party that obtains a remand of a removed case.

Second, while a fee award to a prevailing civil rights plaintiff necessarily runs against a defendant that has been shown to have violated federal law, the same cannot be said of a fee award against an unsuccessful removing party. To be sure, the removing party in such a case has indeed failed in its effort to litigate the case in federal court pursuant to statutes that expressly provide for removal. But a party that has been unsuccessful in seeking a federal forum has not thereby violated any substantive norms established by federal law. A party who reasonably but unsuccessfully invokes substantive federal law, like the civil rights statutes, does not violate any federal policy. The same is true of a party who reasonably but unsuccessfully invokes a federal forum or procedural right. Because a remand does not establish that the removing party has violated substantive law, the "violation of law" rationale does not support petitioners' claim that a party that obtains a remand is entitled to an automatic or presumptive award of fees. See *Ruckelshaus* v. *Sierra Club*, 463 U.S. 680, 688 n.9 (1983) (success on "purely procedural issues" insufficient to trigger award of fees).

3. Petitioners' contention that a successful remand movant should automatically or presumptively be awarded fees is also inconsistent with *Fogerty*. In that case, the Court rejected the argument that the Copyright Act's fee-shifting provision "was intended to adopt the 'British Rule,'" under which the prevailing party would "be awarded attorney's fees as a matter of course, absent exceptional circumstances." 510 U.S. at 533. The Court explained that "Congress legislates against the strong background of the American Rule," under which "parties are to bear their own attorney's fees." *Ibid.* Given only a statute that granted discretion to district

courts to award fees, the Court stated that it would "find it impossible to believe that Congress, without more, intended to adopt the British Rule." *Id.* at 534. As the Court explained, "[s]uch a bold departure from traditional practice would have surely drawn more explicit statutory language and legislative comment." *Ibid.* The Court accordingly concluded that "attorney's fees are to be awarded to prevailing parties only as a matter of the court's discretion." *Ibid.* As in *Fogerty*, the virtually "automatic awarding of attorney's fees" that petitioners seek here would improperly "pretermit the exercise of th[e] discretion" that Congress granted in Section 1447(c). *Id.* at 533.

B. This Court's Cases Establish That Fees Should Not Be Assessed Under Section 1447(c) Absent A Showing Of Fault

When, as here, the special rationales that justify a presumptive award of fees to prevailing parties in civil rights and similar cases are not applicable, this Court's cases establish that an award of fees under a discretionary fee-shifting statute like Section 1447(c) should generally depend on the good faith and objective reasonableness of the removing party's position.

1. Having found that the rationales that support a virtually automatic award of fees to a prevailing civil rights plaintiff are inapplicable to a prevailing civil rights defendant, the Court in *Christiansburg Garment* delineated the standard that governs an award of fees to a prevailing defendant. The Court held that "a plaintiff [in a Title VII case] should not be assessed his opponent's attorney's fees unless a court finds that [the plaintiff's] claim was frivolous, unreasonable, or groundless, or that the plaintiff continued to litigate after it

clearly became so," or that the plaintiff "brought or continued [the] claim in *bad faith*." 434 U.S. at 422. That standard should govern here as well.

Christiansburg Garment noted that Congress has granted "limited exceptions" to the American Rule only "under selected statutes granting or protecting various federal rights," such as the civil rights laws. 434 U.S. at 415 (quoting *Alyeska Pipeline Co.* v. *Wilderness Soc'y*, 421 U.S. 240, 260 (1975)). A plaintiff who brings a civil rights case invokes such a federally protected right. Because "seldom can a prospective plaintiff be sure of ultimate success," awarding fees merely because the plaintiff is ultimately unsuccessful would discourage such invocation. 434 U.S. at 422. Absent evidence to the contrary, it should not be assumed that Congress, at one and the same time, has granted a federal right while also taking steps to discourage invocation of that right whenever ultimate success is less than certain. Accordingly, fees are awarded against an unsuccessful civil rights plaintiff only upon a showing that the plaintiff acted in bad faith or without reasonable legal foundation. *Ibid.*

An unsuccessful removing party is in a position analogous to that of an unsuccessful civil rights plaintiff. The party that unsuccessfully removes a case, like the unsuccessful civil rights plaintiff, has invoked a federally conferred right—namely, the right to remove a case to federal court. A rule of automatic or presumptive fee awards to the unsuccessful removing party—like a rule providing for a similar award of fees against an unsuccessful civil rights plaintiff—would operate to discourage the party attempting to make use of that right from doing so in any but the most certain cases. Accordingly, as in *Christiansburg Garment*, a court

should not award fees against the party that has invoked the federal right in the absence of any showing of fault. The appropriate standard for fee liability is not a mere failure to prevail, see 434 U.S. at 422, but rather a showing that the party's position is "frivolous, unreasonable, or groundless," or advanced in bad faith. *Ibid.*

2. That conclusion is supported by other decisions of this Court, which have adopted or approved the same or a similar approach. In *Zipes*, the Court held that fee awards against losing intervenors are subject to the *Christiansburg Garment* standard, and thus are appropriate "only where the intervenors' action was frivolous, unreasonable, or without foundation." 491 U.S. at 761. The Court noted that such intervenors "are not * * * disfavored participants" in the proceedings, *id.* at 763, and that awarding fees against them "would further neither the general policy that wrongdoers make whole those whom they have injured nor Title VII's aim of deterring employers from engaging in discriminatory practices," *id.* at 762. Similarly here, an unsuccessful removing party is not a "disfavored participant" in the proceeding, but a party that has attempted to invoke a congressionally granted right. And awarding fees against an unsuccessful removing party, like awarding fees against an unsuccessful Title VII intervenor, would similarly fail to vindicate any principle of compensation in the substantive law. Accordingly, as in *Zipes*, fees should ordinarily be awarded against the removing party under Section 1447(c) only if that party's position is without reasonable justification or taken in bad faith.

In *Fogerty*, the Court was not called upon to announce the standard for awarding fees under the Copyright Act, because the question presented was whether "dual" standards, rather than a uniform

standard, should govern awards of fees to prevailing plaintiffs and prevailing defendants, respectively. 510 U.S. at 521. After rejecting the "dual" standards approach, however, the Court noted that the Third Circuit had held that courts should consider factors such as "frivolousness, motivation, objective unreasonableness (both in the factual and legal components of the case) and the need in particular circumstances to advance considerations of compensation and deterrence" in awarding fees under the Act. *Id.* at 534 n.19 (quoting *Lieb* v. *Topstone Indus., Inc.*, 788 F.2d 151, 156 (3d Cir. 1986)). The Court "agree[d]" that those factors "may be used to guide courts' discretion" in awarding fees. *Ibid.* Aside from the particular substantive policies of the Copyright Act in favor of compensation and deterrence, which have no application to the procedural issue in this case, those factors focus on the good faith and objective justifications supporting the losing party's legal position. As in *Fogerty*, those factors should guide a district court's discretion in awarding fees under Section 1447(c).

II. THE LEGISLATIVE HISTORY OF SECTION 1447(c) SUGGESTS AT MOST A PURPOSE TO AUTHORIZE FEES IF THE REMOVAL WAS WITHOUT REASONABLE LEGAL FOUNDATION

This Court observed in *Fogerty* that if Congress intended a fee-shifting statute to provide for an automatic or presumptive award of fees, at the very least some "legislative comment" would be expected to that effect. 510 U.S. at 534. The history of Section 1447(c) reveals no such "legislative comment." To the contrary, the legislative record is silent, and it is reasonable to infer that the statutory reference to attorney's fees was

included, at most, for the more modest purpose of resolving confusion in the lower federal courts by making clear that courts were permitted to award fees in a remand order when the removal had been shown to be without a reasonable justification.

1. At the time of its amendment by the Judicial Improvements and Access to Justice Act of 1988, Pub. L. No. 100-702, Tit. X, § 1016(c), 102 Stat. 4670 (the 1988 Act), Section 1447(c) provided that in cases "removed improvidently and without jurisdiction, the district court shall remand the case, and may order the payment of just costs." 28 U.S.C. 1447(c) (1982). The 1988 Act amended the statute to provide that "[a]n order remanding the case may require payment of just costs and any actual expenses, including attorney fees, incurred as a result of the removal." The legislative history of the 1988 Act does not specifically discuss the addition of the words "including attorney fees" in the amended Section 1447(c), and otherwise suggests, at most, that the amendment was intended to accomplish only modest objectives, not the complete departure from the American Rule posited by petitioner.

The 1988 Act originated in proposals from the Judicial Conference that addressed a wide range of issues concerning the federal judiciary. See *Court Reform and Access to Justice Act: Hearings Before the Subcomm. on Courts, Civil Liberties, and the Administration of Justice of the House Comm. on the Judiciary*, 100th Cong., 1st & 2d Sess. 16-17 (1987-1988). Those proposals originally included no provisions concerning removal. Two days before a congressional hearing on the subject on September 23, 1987, the Judicial Conference adopted some proposals addressing removal, including what became the amendment to

Section 1447(c). See *id.* at 2, 17, 50-52. The new proposals were presented to Congress and incorporated into the bill, see H.R. Rep. No. 889, 100th Cong., 2d Sess. 20-21 (1988), and were enacted without change in the 1988 Act.

As the House Report explained, the removal provisions

> would, among other things, allow the citizenship of fictitious or "Doe" defendants to be disregarded for removal purposes; simplify the "pleading" requirements for removal; establish a one-year limit on removal based on diversity jurisdiction; eliminate the bond requirement on removal procedure; and regulate the joinder of additional parties after removal.

H.R. Rep. No. 889, *supra*, at 71. The Report made only two references to the provision for award of costs and fees at issue in this case. The Report commented that

> the proposed amendment to section 1447(c) will ensure that a substantive basis exists for requiring payment of actual expenses incurred in resisting an improper removal; civil rule 11 can be used to impose a more severe sanction when appropriate.

Id. at 72. And the Report added that "[t]he proposal also would amend section 1447(c) to ensure that the court may order payment of actual expense caused by an improper removal." *Ibid.* Those same two comments were included in a section-by-section analysis prepared in connection with Senate consideration of the bill. See 134 Cong. Rec. 31,064-31,065 (1988).

In the floor debates, there was no specific mention at all of the attorney's fee provision. The omnibus bill as a whole, however, was repeatedly described as "noncontroversial." 134 Cong. Rec. at 23,583 (Cong. Moorhead),

23,584 (same), 31,050 (Sen. Heflin). Had Congress intended to reverse the American Rule fundamentally and provide for routine fee awards to a party that is successful on a remand motion, "such a bold departure from traditional practice would surely have drawn more explicit statutory language and legislative comment." *Fogerty*, 510 U.S. at 534. The complete absence of any comment in the legislative record suggests that the attorney's fees provision was intended at most to make a modest change in existing law, not the 180-degree turn that petitioners' view would entail.[4]

2. The legal context in 1988 suggests a reasonable alternative explanation for the amendment. At the time of the 1988 Act, there was disagreement among the lower courts over the extent to which the preexisting statutory authorization to award costs included authority to award an attorney's fee. A few courts held that fees could be awarded as "costs" under Section 1447(c) without a finding of bad faith.[5] The weight of the

[4] Petitioners argue (Br. 24) that by deleting the word "improvidently" from Section 1447(c), the 1988 Act "reject[ed] any requirement of culpability beyond mere incorrectness" for the imposition of costs. Prior to 1988, however, a showing that the case was removed "improvidently and without jurisdiction" was a prerequisite for a *remand* under Section 1447(c), as well as for an award of costs. There is no reason to believe that Congress intended, when it deleted that phrase, to change the substantive conditions for remand or to affect the circumstances in which costs and fees could be awarded.

[5] See, *e.g.*, *Township of Elba* v. *Steffenhagen*, 664 F. Supp. 1238, 1241 (E.D. Wis. 1987) (awarding fees for "patently deficient" removal); *Syms, Inc.* v. *IBI Sec. Serv., Inc.*, 586 F. Supp. 53, 56-57 (S.D.N.Y. 1984) (holding that fees can be awarded "where a removal is effected in bad faith *or* is predicated upon a diversity of citizenship that clearly does not exist," and awarding fees because "removal was clearly improper") (emphasis added); cf. *Elsis* v. *Hertz Corp.*, 581 F. Supp. 604, 608 (E.D.N.Y. 1984) (awarding fees for "poorly premised," eve-of-trial

authority, however, was that fees could not be awarded under Section 1447(c) absent a finding of bad faith under the ordinary standards of the American Rule.[6] A number of courts had specifically held that they could not award fees when a party, although not acting in bad faith, had engaged in conduct relating to removal that was without reasonable legal justification.[7]

removal, without express finding of bad faith).

[6] See, *e.g.*, *Cap Makers Union* v. *Feinstein*, 671 F. Supp. 258, 261 (S.D.N.Y. 1987) (denying application for costs and fees because "bad faith has not been shown"); *Armstrong* v. *Goldblatt Tool Co.*, 609 F. Supp. 736, 739 (D. Kan. 1985) (awarding costs on remand, but not awarding fees because no bad faith); *Schmidt* v. *National Org. for Women*, 562 F. Supp. 210, 215 (N.D. Fla. 1983) (same); *Zoyoipoulos* v. *Palombo*, 584 F. Supp. 867 (D. Colo. 1984) (fees unavailable on remand without showing of bad faith); *Zimmerman* v. *Conrail*, 550 F. Supp. 84, 87 (S.D.N.Y. 1982) ("Fees incurred in contesting removal have been awarded when the removing party has acted in bad faith."); see also *Bell Fuels* v. *Miller*, No. 88C1915, 1988 WL 124337, at *1 (N.D. Ill. Nov. 17, 1988) ("The overwhelming weight of the authority * * * is that attorneys fees may be awarded only upon demonstration that the removal petition was filed in bad faith."); cf. *Muirhead* v. *Bonar*, 556 F.2d 735, 736 (5th Cir. 1977) (awarding fees on finding that second removal of case was in "bad faith"); *Peltier* v. *Peltier*, 548 F.2d 1083, 1084-1085 (1st Cir. 1977) (same); *Smith* v. *Student Non-Violent Coordinating Comm.*, 421 F.2d 522, 524 (5th Cir. 1969) (same); *Baldwin* v. *Burger Chef Sys., Inc.*, 507 F.2d 841, 842 (6th Cir. 1974) (fees not awardable on remand because no showing of bad faith or other exceptional circumstances).

[7] See, *e.g.*, *Cornwall* v. *Robinson*, 654 F.2d 685, 687 (10th Cir. 1981) (fees not available on "findings of negligence, frivolity, or improvidence" under Section 1447(c)); *Medical Legal Consulting Serv., Inc.* v. *Covarrubias*, 648 F. Supp. 153, 158-159 (D. Md. 1986) (finding that "basis for removal" was "sufficiently weak" for award of costs, but no basis for award of fees because no bad faith shown); *Moore* v. *Bishop*, 520 F. Supp. 1187, 1188 (D.S.C. 1981) (awarding costs on finding that removal not "substantial, close, or novel," but finding no authority to award fees); *Pack* v. *Rich Terminal Co.*, 502 F. Supp. 58, 60 (S.D. Ohio 1980)

In that context, it is reasonable to infer that the Judicial Conference's proposal to amend Section 1447(c), and Congress's enactment of it, reflected an intent to resolve the existing confusion and clarify that courts could award fees for objectively unreasonable removals. Citing this Court's decision in *Alyeska*, which held that district courts generally may not award fees absent a finding of bad faith, a prominent treatise had proposed just that change. See 14 Charles A. Wright et al., *Federal Practice and Procedure* § 3739, at 587-588 (2d ed. 1986) ("It would be desirable *in some cases* to tax the removing parties with an attorney's fee on the motion to remand, but an amendment of the statute probably is necessary to provide courts with authority to do so.") (emphasis added). In light of the firm tradition and presumptions reflected in the American Rule, it could be argued that Congress's mere addition of discretionary authority to award fees may have been insufficient to achieve even that modest purpose. But in no event can that bare grant of discretion be used to displace the American Rule completely and authorize an automatic or presumptive award of fees in every case upon remand, as petitioners propose.

3. Petitioners argue (Br. 25) that construing Section 1447(c) to accomplish a more modest objective and to authorize fees only on a finding of bad faith or lack of reasonable legal foundation would merely duplicate Federal Rule of Civil Procedure 11. The 1988 text of Rule 11, however, imposed sanctions for pleadings that were not "warranted by existing law or a *good faith*

(awarding costs because "nonremovability is obvious," but finding no basis to award fees). See also *Schmidt*, 562 F. Supp. at 215 (finding fees not available "for negligence, frivolity, or improvidence," but awarding costs on a "clearly less stringent" showing).

argument for the extension, modification, or reversal of existing law" (emphasis added). It was not until 1993 that the reference to "good faith" was removed, and Rule 11 was amended to require a certification that arguments were "warranted by existing law or by a *nonfrivolous* argument for the extension, modification, or reversal of existing law or the establishment of new law." Fed. R. Civ. Pro. 11(b)(2) (emphasis added).[8] Although the pre-amendment version of the rule had been construed by most courts to impose an objective standard,[9] not all courts agreed with that view.[10] Ac-

[8] See Carl Tobias, *The 1993 Revision of Federal Rule 11*, 70 Ind. L.J. 171, 196 (1994) ("The critical change included in the 1993 amendment of Rule 11 * * * is the requirement that attorneys * * * present papers which are warranted by a nonfrivolous, rather than a good faith, 'argument for the extension, modification or reversal of existing law or the establishment of new law.'"). Even today, monetary sanctions may be assessed against counsel, but not against represented parties, for frivolous or unreasonable arguments for modifying existing law under Rule 11(c)(2)(A). Section 1447(c) includes no such limitation, and it thus may continue to provide authority that goes beyond Rule 11.

[9] See, *e.g.*, *Burda* v. *M. Ecker Co.*, 2 F.3d 769, 774 (7th Cir. 1993) ("Rule 11 does not require that the district court make a finding that the transgressor acted in bad faith."); *Eastway Constr. Corp.* v. *City of New York*, 762 F.2d 243, 253 (2d Cir. 1985) ("Simply put, subjective good faith no longer provides the safe harbor it once did."); *Lieb* v. *Topstone Indus., Inc.*, 788 F.2d 151, 156 (3d Cir. 1986) (same); *Zaldivar* v. *City of Los Angeles*, 780 F.2d 823, 829 (9th Cir. 1986) (similar); see also *Wolst* v. *American Airlines, Inc.*, 668 F. Supp. 1117, 1120 (N.D. Ill. 1987) (holding fees unavailable under Section 1447(c) absent bad faith, but awarding them under Rule 11).

[10] See, *e.g.*, *Nelson* v. *Piedmont Aviation, Inc.*, 750 F.2d 1234, 1238 (4th Cir. 1984) (affirming district court's refusal to award fees based on finding that there was "insufficient evidence * * * to rule that the action was filed in 'bad faith' under [Rule 11]"), cert. denied, 471 U.S. 1116 (1985); *Williams* v. *Birzon*, 576 F. Supp. 577, 580 & n.5 (W.D.N.Y. 1983) (holding that, because "this action was not commenced in bad faith," it

cordingly, Congress would have had good reason to address the confusion, in the specific context of remands under Section 1447, and provide authority for courts to award fees for an unreasonable, but good faith, removal.

4. Petitioners argue (Br. 19) that "a major concern" of the 1988 Act was "the avoidance of further burdens on the already too-burdened federal judiciary." See also Pet. Br. 11-12. According to petitioners (Br. 19), construing Section 1447(c) to permit an automatic or presumptive award of fees would address that congressional concern, by discouraging parties—even (or especially) those whose cases "present[] a close question" on removal—from removing their cases to federal court.

Petitioners are mistaken. The 1988 Act as a whole included numerous provisions addressing a wide range of matters, from modifications to the Federal Circuit's jurisdiction to judicial housekeeping matters such as

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is "not * * * the type of situation * * * contemplated in the amendment to Rule 11"), aff'd, 740 F.2d 955 (2d Cir. 1984); *D.G. Rung Indus., Inc.* v. *Tinnerman*, 626 F. Supp. 1062, 1064 (W.D. Wash. 1986) (declining to impose sanction under Rule 11 because court "does not find * * * bad faith"); *Cap Makers Union*, 671 F. Supp. at 261 (in removal case, denying "application for costs and Rule 11 sanctions" because "bad faith has not been shown"); *Sam & Mary Housing Corp.* v. *New York*, 632 F. Supp. 1448, 1453 (S.D.N.Y. 1986) ("An assessment of fees against counsel [under Rule 11] requires a showing that the attorney acted in bad faith to willfully abuse the judicial process."); *Can Am Indus.* v. *Firestone Tire & Rubber Co.*, 631 F. Supp. 1180, 1185 (C.D. Ill. 1986) ("There is only one test required for allowing sanctions under Rule 11 and that is that there be a showing 'of subjective bad faith' on the part of the party to be sanctioned."); see also *Nesmith* v. *Martin Marietta Aerospace*, 833 F.2d 1489, 1491 (11th Cir. 1987) (fees not awardable under Rule 11 because no bad faith shown, but fees were awardable under *Christiansburg Garment* against Title VII plaintiff who brought case "without foundation").

jury selection and the use of interpreters. The most significant suggested means of easing the burden on the federal judiciary was the proposal to abolish diversity jurisdiction. That proposal, however, was *not* enacted. It was eliminated in committee, see H.R. Rep. No. 889, *supra*, at 44-45, and the enacted bill instead simply raised the amount-in-controversy requirement in diversity cases from $10,000 to $50,000. See 1988 Act § 201, 102 Stat. 4646. Insofar as Congress sought to address congestion in the federal courts, therefore, the most that can be said is that Congress took that goal into account in the provisions of the 1988 Act directly addressing the breadth of federal jurisdiction. Congress certainly did not attempt to achieve that goal in each provision of the Act, and even when Congress addressed that goal, it did not pursue it absolutely. There is no warrant for construing every provision of the Act as if relieving congestion in the federal courts was Congress's exclusive and single-minded goal.

Indeed, with respect to the 1988 Act's removal provisions in particular, there is no basis for petitioners' claim that Congress's single-minded or principal intent was to ease the burden on federal courts by discouraging removal. Aside from the costs-and-fees provision, Congress amended the removal provisions in five respects. Four (allowing the citizenship of fictitious or "Doe" defendants to be disregarded for removal purposes, simplifying the pleading requirements for removal, requiring a motion to remand for a defect in removal procedure to be made within 30 days, and eliminating the bond requirement) tended to make removal more easily available or more convenient, while only one (establishing a time limit on removal in diversity cases) restricted it. See p. 19, *supra*. Neither

the provisions of the 1988 Act nor its legislative history suggests any intent to discourage removal generally or to make cases removed based on a reasonable (though ultimately unsuccessful) legal justification more costly.[11]

III. HINGING A FEE AWARD ON A FINDING OF BAD FAITH OR LACK OF REASONABLE LEGAL JUSTIFICATION CONFORMS TO THE POLICIES UNDERLYING THE REMOVAL STATUTES

1. Petitioners correctly assert (Br. 9) that awarding fees automatically or presumptively against an unsuccessful removing party "create[s] incentives" because doing so would "deter one side [the removing party] from engaging in behavior [removing a case on a less-than-certain legal basis] that will give rise to a fee award, and * * * encourage the other side to challenge such behavior." Were parties routinely assessed fees for reasonably removing a case that was later remanded, such "hindsight logic" would "discourage all but the most airtight [removals], for seldom can a prospective [party] be sure of ultimate success. * * * [N]o matter

[11] Petitioners mistakenly argue (Br. 24-25, 31) that fees are awardable under Section 1447(c) only to the party that obtains the remand, and not to the unsuccessful removing party. While such awards presumably constitute the vast majority of awards under Section 1447(c), nothing in the statutory text precludes an award of fees to the removing party, and there are circumstances in which such an award has been found appropriate. See *Brooks* v. *Pre-Paid Legal Servs.*, 153 F. Supp. 2d 1299, 1302 (M.D. Ala. 2001) (awarding fees to defendant/removing party); *Shrader* v. *Legg Mason Wood Walker, Inc.*, 880 F. Supp. 366, 369-371 (E.D. Pa. 1995) (same); *Barraclough* v. *ADP Auto. Claims Serv., Inc.*, 818 F. Supp. 1310, 1313 (N.D. Cal. 1993) (same); but cf. *Fowler* v. *Safeco Ins. Co.*, 915 F.2d 616, 618 (11th Cir. 1990) (decided under pre-1988 version of Section 1447(c); stating that former version of statute "appears to contemplate the imposition of costs only on the defendant").

how meritorious one's claim may appear at the outset, the course of litigation is rarely predictable." *Christiansburg Garment*, 434 U.S. at 422.

Petitioners argue, however, that, because removal may impose certain costs and because the federal judiciary is overburdened, the policy underlying the removal statutes is to discourage removal in all but the most clear-cut cases. Indeed, petitioners contend (Br. 19, 23) that a fee award is particularly warranted to deter parties from removing cases based on a reasonably sound but ultimately unsuccessful view of the law, because "the closest questions can often create the greatest drain" on the judiciary. *Id.* at 23; see also *id.* at 33 ("[T]he existence of a reasonable basis for the removal should not be considered as a factor weighing *against* a fee award.").

As explained above, there is no basis for petitioners' conclusion that the 1988 Act—and, specifically, its removal provisions—were enacted in single-minded pursuit of the goal of deterring removal so as to ease docket congestion in the federal courts. More generally, however, this Court has recognized that the removal statutes advance important and legitimate interests in permitting certain claims to be litigated in a federal forum.

Last Term, for example, the Court emphasized in a removal case "the commonsense notion that a federal court ought to be able to hear claims * * * that * * * turn on substantial questions of federal law, and thus justify resort to the experience, solicitude, and hope of uniformity that a federal forum offers on federal issues." *Grable*, 125 S. Ct. at 2367. The Court noted that even an issue that arose in litigation between private parties over the meaning of a federal tax provision was "an

important issue of federal law that *sensibly belongs in a federal court.*" *Id.* at 2368 (emphasis added). See also *Arizona* v. *Manypenny*, 451 U.S. 232, 241 (1981) (noting that) federal-officer removal "permits a trial upon the merits of the state-law question free from local interests or prejudice" and rejecting "narrow, grudging interpretation of 28 U.S.C. 1442(a)(1)); cf. *Exxon Mobil Corp.* v. *Allapattah Servs., Inc.*, 125 S. Ct. 2611, 2618 (2005) (noting Congress's purpose in establishing diversity jurisdiction, "which is to provide a federal forum for important disputes where state courts might favor, or be perceived as favoring, home-state litigants"). Those interests would be disserved by petitioners' rule, which is designed to discourage parties from removing on the basis of a reasonable, but not ironclad, jurisdictional theory.

2. As petitioners argue (Br. 18), an improperly removed case may temporarily set askew "the proper balance between federal and state control." That balance, however, is ultimately restored upon remand. A case involving a federal question that is *not* removed due to the perverse incentives of petitioners' standard, however, would impose a comparable cost: It would deprive the parties of the benefits of a federal forum that Congress intended to give them, including the traditional role of the federal courts in adjudicating substantial questions of federal law in an experienced and uniform way. And that deprivation would be permanent. In this regard, it bears emphasis that the removal statutes play a central role in a federal judicial system of overlapping jurisdiction. The smooth and undistorted functioning of the removal statutes forms a background against which Congress makes choices

about exclusive and concurrent jurisdiction, as well as the optimal scope of the diversity statute.

Removal would be a particularly poor context in which to experiment with a judicially imposed policy decision to discourage parties from taking action based on an objectively reasonable but debatable legal foundation. A motion for removal generally must be filed at the very outset of litigation, before extensive discovery (or even a defendant's own detailed factual investigation) can take place. See 28 U.S.C. 1446(b). Because remand orders are generally not reviewable, see 28 U.S.C. 1447(d), there are particular areas of uncertainty in the law of removal. And, as this Court has noted, there is no "'single, precise, all-embracing' test for" subject-matter jurisdiction. *Grable*, 125 S. Ct. at 1268. Cf. *Christiansburg Garment*, 434 U.S. at 422 (noting that "[d]ecisive facts may not emerge until discovery or trial," or "[t]he law may change or clarify in the midst of litigation").[12] In the face of such uncertainty, "[t]o take the further step of assessing attorney's fees against [parties] simply because they do not finally prevail would substantially add to the risks inhering in most litigation." *Ibid.*

The litigation of issues—even removal issues—that are uncertain can have substantial utility in clarifying the law. In *Grable*, for example, a reasonable, though controversial, removal ultimately led to this Court's unanimous decision affirming the removing party's jurisdictional theory and resolving a conflict in the

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[12] In this case, for example, petitioners did not object to the removal until facts limiting the amount in controversy emerged more than a year later. The eventual remand was based primarily on post-removal decisions of the circuit that have once again become open to question in light of this Court's decision in *Exxon Mobil*. See p.4 & note 2, *supra*.

circuits on an important question that had been left in some doubt by the Court's prior cases. For courts to impose costs and fees automatically or presumptively would create a Catch-22 for removing parties: In the name of reducing work for the courts, defendants would be dissuaded from taking the very steps that might help elucidate the law—with the result that unresolved issues would remain uncertain, and cases would remain close.

3. Ultimately, declining to award fees absent a showing that a party has acted in bad faith or without reasonable justification is the approach most consistent with the policies of the removal statutes. Removals that are frivolous or unreasonable will be discouraged; the validity of removals that are based on reasonable legal premises may be litigated and resolved by the courts without obstacle; and removals that are meritorious will face no barrier.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

PAUL D. CLEMENT
Solicitor General
PETER D. KEISLER
Assistant Attorney General
THOMAS G. HUNGAR
Deputy Solicitor General
JAMES A. FELDMAN
Assistant to the Solicitor General
MICHAEL JAY SINGER
MICHAEL E. ROBINSON
Attorneys

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APPENDIX

STATUTORY PROVISION INVOLVED

28 U.S.C. 1447(c) provides:

> A motion to remand the case on the basis of any defect other than lack of subject matter jurisdiction must be made within 30 days after the filing of the notice of removal under section 1446(a). If at any time before final judgment it appears that the district court lacks subject matter jurisdiction, the case shall be remanded. An order remanding the case may require payment of just costs and any actual expenses, including attorney fees, incurred as a result of the removal. A certified copy of the order of remand shall be mailed by the clerk to the clerk of the State court. The State court may thereupon proceed with such case.